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414001—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 547

BENJAMIN MAHLER AND JULIA F. MAHLER,
PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 128–135) is reported at 119 F. (2d) 869. The unpublished memorandum opinion of the Board of Tax Appeals is printed in the record at pages 35 to 58, inclusive.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 6, 1941 (R. 135). The petition for a writ of certiorari was filed August 25, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in holding that the petitioners were not entitled in 1934 to deduct as a loss their investment in shares of common stock of Middle West Utilities Company.

STATUTE INVOLVED

Revenue Act of 1934, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or
>
> * * * * *

(U. S. C., Title 26, Sec. 23.)

STATEMENT

The petitioners are husband and wife, residents of the State of New York, where they filed a joint federal income tax return for the taxable year 1934 (R. 35–36).

During 1934 Benjamin Mahler was the owner of 1,300 shares of common stock in Middle West Utilities Company which had a cost basis to him of $24,144.32, and Julia F. Mahler was the owner of 65 shares of $6 cumulative preferred stock in Middle West Utilities Company which she had acquired in 1929 at a cost of $6,500 (R. 36). In their income tax return for the taxable year 1934 the petitioners deducted the cost of those shares as a loss, sustained within the taxable year (Ex. 7; see R. 119, 120). The deduction was disallowed by the Commissioner of Internal Revenue (R. 20, 25), and the petitioners appealed to the Board of Tax Appeals (R. 7–8).

On the basis of the evidence adduced at the hearing before it the Board of Tax Appeals held that the petitioners had failed to prove that any loss was sustained within the taxable year 1934 by reason of the preferred and common stock in Middle West Utilities having become worthless during the year 1934 and upheld the Commissioner's determination (R. 35–47, 58). It found affirmatively that the stock had become worthless in 1932 (R. 45).[1]

In its opinion the Circuit Court of Appeals reviewed the findings of the Board of Tax Appeals and held that the evidence sustained the finding

[1] Other issues raised before the Board of Tax Appeals and the Circuit Court of Appeals are not before the Court on the petition for certiorari.

of the Board that the common stock of Middle West Utilities became worthless prior to the taxable year 1934 (R. 128–134). The Circuit Court of Appeals concluded otherwise, however, with respect to the preferred stock of Middle West Utilities Company, holding that the evidence established the petitioners' right to deduct the cost of that stock as a loss sustained in 1934 (R. 134). It therefore affirmed the decision of the Board as to the common stock but reversed as to the preferred stock. The Government has not sought review of that portion of the decision relating to the preferred stock.

ARGUMENT

1. The only question now involved in this proceeding is whether the petitioners are entitled to deduct from their 1934 income, as a loss sustained in the taxable year,[2] the cost of certain shares of common stock in Middle West Utilities Company which they had acquired prior to the taxable year. Whether they are entitled to the deduction depends upon whether, as they contend, the stock became worthless during the taxable year.

Whether stock in a corporation became worthless during a particular year is a question of fact to be determined from the evidence adduced. And the question for decision by the Circuit Court of

[2] A loss can be deducted only for the year in which it is sustained. *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

Appeals is whether the findings of the Board are supported by substantial evidence.[3]

In this case the burden was upon the petitioners to prove that the stock which they owned in Middle West Utilities Company became worthless in 1934. From the evidence before it the Board found that the stock had become worthless prior to the taxable year. The Circuit Court of Appeals held that the evidence sustained the Board's findings with respect to the common stock, but held otherwise as to the preferred stock.

While there may be some doubt as to whether the Circuit Court of Appeals exceeded its authority in reversing the finding of the Board with respect to the preferred stock, it properly refused to disturb the Board's findings with respect to the common stock since, as outlined in the court's opinion, there was ample supporting evidence in the record.

2. Petitioners' central argument (Br. 13–25) is to the effect that they did not have to prove that the Middle West Utilities Company stock *became* worthless in 1934, the year they claimed the deduction, because the Commissioner, in disallowing the deduction, stated that the stock did not become worthless prior to the end of 1935. It is therefore

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[3] *Coleman* v. *Commissioner*, 81 F. (2d) 455 (C. C. A. 10); *Cass* v. *Helvering*, 83 F. (2d) 841 (C. C. A. 8); *Squier* v. *Commissioner*, 68 F. (2d) 25 (C. C. A. 2); *Lambert* v. *Commissioner*, 108 F. (2d) 624 (C. C. A. 10); *Bartlett* v. *Commissioner*, 114 F. (2d) 634 (C. C. A. 4).

argued that the only burden imposed upon them was to prove that the stock was worthless in 1934. But this argument ignores the fact that the burden is upon the taxpayer in every case to establish his right to the deduction claimed, and the petitioners here had the burden, from the beginning, of showing that some event occurred *during* the taxable year which caused the stock to become worthless. The pivotal determination of the Commissioner was that there was no such event. Whether his determination was based on the subsidiary conclusion that the identifiable event was prior or subsequent to the taxable year was unimportant, for it was necessary for him to determine merely that it did not occur during the year in question.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. The petition presents no question calling for review.

Respectfully submitted.

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